IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 12, 2007 Session

LATECIA GAIL WATSON DICHRISTINA v. MARK WILLIAM DICHRISTINA

Appeal from the Circuit Court for Warren County
No. 1992 Larry B. Stanley, Jr., Circuit Judge

No. M2006-00025-COA-R3-CV - Filed on May 11, 2007

On this appeal from a divorce action, the husband alleges the trial court erred in awarding wife alimony *in futuro* in the amount of $600.00 per month, in admitting into evidence an indictment charging him with unlawful sexual contact with wife's minor daughter and in finding that husband had implicated himself in misconduct toward the daughter. We find no error and affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

DONALD P. HARRIS, SR.J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., and FRANK G. CLEMENT, JR., J., joined.

Michael K. Parsley, Nashville, Tennessee, for the Appellant, Mark William DiChristina.

Thomas F. Bloom, Nashville, Tennessee, for the Appellee, Latecia Gail Watson DiChristina.

OPINION

The wife in this divorce action, Latecia DiChristina, was forty-two years of age at the time of the trial and was living in publicly assisted housing in McMinnville. She has three children from a former marriage. She and Mr. DiChristina were married for nine years. During that time he was employed at Bouldin & Lawson, as a welding supervisor. Ms. DiChristina was employed at the DeKalb Telephone Coop but was forced to terminate that employment because she developed thoracic outlet syndrome resulting in surgery. Ms. DiChristina had a house in Dowelltown, in Dekalb County, prior to her marriage to Mr. DiChristina. She still owns that home, but moved to Warren County into a house owned by Mr. DiChristina when she had the surgery in order to have help getting her children to and from school. According to Ms. DiChristina, Mr. DiChristina also operated a plant nursery business on his property. Mr. DiChristina testified that he was no longer in the nursery business because, when he returned to the property following the separation of the parties, all the plastic had been torn off the greenhouses and the water no longer ran to them.

Ms. DiChristina now works about twenty-four hours a week earning $6.00 per hour. She is the Director of the Faith In Action program which coordinates the assignment of volunteers to assist home bound elderly and disabled citizens in Warren County. She also assists at the Warren County Senior Citizens Center by maintaining records related to the activities of seniors while they are at the center.

Dr. Marshall Millman, a physician whose practice is limited to anaesthesiology and pain medicine has treated Ms. DiChristina for over four years for the pain in her back and neck. She was initially referred to Dr. Millman for low back and leg pain. He diagnosed Ms. DiChristina with lumbar radiculopathy and myofacial pain. He treated her with a series of lumbar epidural steroid injections. Later, Ms. DiChristina complained of recurring neck pains and symptoms going down her right arm. An MRI revealed osteochondrosis, which is calcification of the disc causing bony spurs to protrude. Two discs in the cervical spine were bulging backward compressing the thecal sac, the fluid filled space in which the spinal cord floats. Ms. DiChristina now has pain emanating from these joints as well as her sacroiliac joint. She has also developed pseudo-arthrosis which is a false joint, basically bone on bone. With movement the two bones rub together, become irritated and inflamed, and can produce severe pain. In Dr. Millman's opinion, these conditions are incurable and Ms. DiChristina will need continued treatment over the years.

In Dr. Millman's opinion, it is virtually impossible for Ms. DiChristina to work more than twenty to twenty-five hours a week. Working in excess of that would increase her pain to the extent of affecting her ability to concentrate on her work.

In March 2003, Ms. DiChristina learned from her daughter that Mr. DiChristina had been going into her room, pulling the covers back on her bed and making her feel uncomfortable. When Ms. DiChristina made this discovery, it had been going on for two years. She confronted Mr. DiChristina with this information. He at first denied it, but later admitted that he had engaged in this activity. She asked that he leave the house and he did so. Mr. DiChristina admitted to his family that the parties were separated because he had been going into the daughter's room. The parties attempted to reconcile, but Ms. DiChristina later learned that Mr. DiChristina had actually touched her daughter sexually. She related the incident to the Department of Children's Services and obtained an order of protection. At trial, Mr. DiChristina denied having ever touched the child. Ms. DiChristina's daughter testified during the trial concerning the practice of Mr. DiChristina coming into her bedroom and raising the bed covers to look at her body. She also testified of two incidents where Mr. DiChristina placed his hand inside her underwear and fondled her.

Ms. DiChristina testified that, after their marriage, Mr. DiChristina continued to meet and converse with women with whom he acknowledged having had a sexual relationship prior to the marriage of the parties. During the marriage, Mr. DiChristina was also named the father of another woman's child that had been born prior to his marriage to Ms. DiChristina. A DNA test proved, however, that he was not the father of this child.

The trial court granted Ms. DiChristina a divorce on the grounds of inappropriate marital conduct, divided the property of the parties and awarded Ms. DiChristina "alimony *in futuro* in the amount of $300.00, payable on the 15th and last day of each month beginning November 30, 2005."[1]

Mr. DiChristina has appealed the judgment of the trial court alleging the trial court erred in awarding alimony *in futuro*, in admitting into evidence an indictment returned by the Warren County Grand Jury charging Mr. DiChristina with the unlawful sexual contact with his step-daughter and in finding that Mr. DiChristina had implicated himself in this offense. Ms. DiChristina raises the issue of whether she is entitled to her attorney's fees incident to this appeal.

1. The award of alimony.

Tennessee Code Annotated section 36-5-121(a) gives the courts discretion to order "suitable support and maintenance of either spouse by the other spouse . . . according to the nature of the case and the circumstances of the parties." In determining whether to award support, and the nature, amount and duration of such support, courts are to consider a number of factors:

> (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
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> (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
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> (3) The duration of the marriage;
>
> (4) The age and mental condition of each party;
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> (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
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> (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
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> (7) The separate assets of each party, both real and personal, tangible and intangible;
>
> (8) The provisions made with regard to the marital property, as defined in § 36-4-121;

[1] Both parties interpret this alimony award to total $600.00 per month.

(9) The standard of living of the parties established during the marriage;

(10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;

(11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and

(12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-121(i) (2005).

It is obvious that many of the enumerated factors are directly related to the economic needs of the parties and their ability to meet those needs with the economic resources and earning potential available to them after divorce. Thus, Tennessee courts have frequently stated that the most important factors to consider when deciding upon alimony are the need of the disadvantaged spouse and the ability of the other spouse to provide support. Robertson v. Robertson, 76 S.W.3d 337, 338 (Tenn. 2002); Bogan v. Bogan, 60 S.W.3d 721, 730 (Tenn. 2001); Aaron v. Aaron, 909 S.W.2d 408, 410 (Tenn. 1995).

As the language of the statute indicates, the trial court has broad discretion in determining the type, amount, and duration of alimony to award, based upon the particular facts of each case. Burlew v. Burlew, 40 S.W.3d 465, 470 (Tenn. 2001); Crabtree v. Crabtree, 16 S.W.3d 356, 360 (Tenn. 2000); Sullivan v. Sullivan, 107 S.W.3d 507, 511 (Tenn. Ct. App. 2002); Kinard v. Kinard, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998). Since alimony is largely a matter in the discretion of the trial court, appellate courts are not inclined to alter a trial court's award of alimony, unless the trial court applied an incorrect legal standard or reached a decision not supported by the facts that causes an injustice to the party complaining. Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001). Findings of fact by the trial court are presumed to be correct unless the evidence preponderates otherwise. Tenn. R. Civ. P. 13(d).

In the case before us, the trial judge indicated that he had considered all the factors, set forth in Tennessee Code Annotated section 36-5-121(i), as set out above. The trial court specifically noted that it gave credibility to Ms. DiChristina's evidence regarding her lack of earning capacity, her potential or lack of potential for vocational rehabilitation, her grounds for divorce, the income available to Mr. DiChristina and the assets of the parties. We find no evidence the trial court applied an incorrect legal standard in arriving at its decision concerning the alimony award.

We next review whether the trial court's award was supported by the facts presented focusing on the needs of Ms. DiChristina and the ability of Mr. DiChristina to provide the support ordered. Ms. DiChristina testified that her bi-monthly gross income was $312 and her net income was $288.13. She also received $600 per month in child support and $262 per month in food stamps. Thus, the total income available to her was $1,438.26 per month. Ms. DiChristina testified that she needed about $2,340 per month for recurring necessary expenses leaving a shortfall of $901.74.

For the first nine months of 2005, Mr. DiChristina grossed $28,499.83. After deducting his federal income withholding, medicare and social security taxes, and his insurance deductions, he netted $20,918.95 or $2,324.33 per month. While Mr. DiChristina claims $3,538.90 in monthly expenses, his expense statement includes $1,798.04 in credit card payments, loan repayments and garnishments. He also lists $125.00 per month in greenhouse and nursery supplies while he testified he was no longer in the nursery business. With these adjustments, the evidence indicated he had $1615.86 in recurring monthly expenses, about $708 less than his monthly net. The trial court could also have found Mr. DiChristina had additional income from nursery operations on his property. He testified he had some 200 "burning bush" plants and "what's left in the greenhouses" that could be sold. The greenhouses themselves had value whether used by Mr. DiChristina or sold. He also indicated other persons were raising nursery plants on his property. While there was no testimony concerning the value or income derived from these operations, they all reasonably could have produced income to Mr. DiChristina.

It appears to us that the trial court applied the correct legal standard in arriving at its alimony award and the evidence factually supported such an award based upon the need of Ms. DiChristina and the ability of Mr. DiChristina to provide support. While no expert testimony is required in a domestic relations case to prove a claimed disability, Thomas v. Thomas, 1995 WL 14677, *3-4 (Tenn. Ct. App. 1995); Tyner v. Tyner, 1985 WL 4136, *2 (Tenn. Ct. App. 1985), the testimony of Dr. Millman factually supported the lack of Ms. DiChristina's potential for rehabilitation further justifying an *in futuro* award. There simply is no basis for this court to find that the trial court abused its discretion in awarding Ms. DiChristina permanent alimony in the amount of $600.00 per month. Accordingly, the trial court's alimony award is affirmed.

b. Introduction of the indictment.

Mr. DiChristina next complains that the trial court erred in admitting into evidence the indictment, filed by the Warren County Grand Jury on June 3, 2005, charging Mr. DiChristina with unlawful sexual contact with Ms. DiChristina's daughter. Objection was made on the ground the document had not been provided in response to an interrogatory asking for all documents that Ms. DiChristina intended to use at trial. As to that ground, the trial court overruled the objection stating that Mr. DiChristina knew he had been indicted and, thus, it was not a surprise. Counsel for Mr. DiChristina also indicated that it was only an indictment and not proof of the crime alleged. The trial court indicated that it understood and would consider that as to weight.

We agree with counsel for Mr. DiChristina that an indictment is not competent evidence in a civil or criminal proceeding to prove the accused committed the offense alleged. See, State v. Morgan, 541 S.W.2d 385, 389 (Tenn. 1976) (citing with approval cases holding that charges, accusations and indictments may not be used to impeach a witness). Similarly, a judgment of acquittal in a criminal proceeding is not admissible in a civil proceeding to prove the accused did not commit the offense alleged. See Tennessee Odin Ins. Co. v. Dickey, 190 Tenn. 96, 99, 228 S.W.2d 73, 74-75 (1950), citing Massey v. Taylor, 45 Tenn. 447, 448 (1868). There is, however, no evidence the trial court considered the indictment in finding inappropriate marital conduct relating to Mr. DiChristina's actions toward his step-daughter. Rather, the trial court specifically relied upon the testimony of the step-daughter, herself, and the admissions of Mr. DiChristina. For whatever purpose the indictment was admitted into evidence by the trial court, we find it did not affect the judgment of the trial court or result in prejudice to Mr. DiChristina with regard to the trial court's finding of marital misconduct. See, Tenn. R. App. P., 36(b).

Moreover, we are of the opinion the indictment was admissible into evidence for some purposes. For example, it was a circumstance facing the parties that had an effect on their financial condition. Mr. DiChristina testified that he borrowed $32,000, two months prior to trial, for his attorney's fees in the criminal case. The trial court needed to know Mr. DiChristina was facing an indictment charging him with a serious offense in order to assess the propriety of his making this loan. We conclude the assignment of error relating to the admission into evidence of the indictment is without merit.

c. The trial court's finding of an admission of misconduct by Mr. DiChristina.

Counsel for Mr. DiChristina alleges the trial court erred when it found Mr. DiChristina had implicated himself in the alleged sexual abuse of his daughter. The finding referred to is contained in the final order of the trial court and states, "the Court gave great weight to the testimony of the Plaintiff's daughter and her statements regarding the Defendant's actions and statements toward her, along with the Defendant's statements implicating himself." Counsel correctly points out that Mr. DiChristina did not admit fondling Ms. DiChristina's daughter during the trial. On one occasion, he testified that he had never touched the girl. When asked, on cross-examination, whether the step-daughter's account of his fondling was true, Mr. DiChristina asserted his privilege against self incrimination.

While there was no evidence Mr. DiChristina admitted fondling Ms. DiChristina's daughter, there is evidence he engaged in other improper conduct. Ms. DiChristina testified that he admitted to her that he had gone into the daughter's bedroom and looked at her while she was in bed. Earnest Watson, Ms. DiChristina's father, testified that Mr. DiChristina admitted going into his granddaughter's bedroom and raising her covers to look at her. There is also evidence that Mr. DiChristina told his own family that the reason he and Ms. DiChristina were separated was that he had been going into the daughter's bedroom. None of the foregoing testimony was denied or contradicted and, in our opinion, are statements of Mr. DiChristina that implicate him in misconduct. The assignment of error relating to the same finding made by the trial court is overruled.

d. Request of Ms. DiChristina for attorney's fees on appeal.

Ms. DiChristina has requested she be awarded her attorney's fees incurred in defending this appeal. We believe she is entitled to recover her reasonable attorney's fees, the amount to be determined by the trial court on remand.

For the foregoing reasons, the judgment of the trial court is affirmed and this matter is remanded. The costs of this appeal shall be assessed to Mr. DiChristina.

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DONALD P. HARRIS, SENIOR JUDGE